evaluated under the Rule of Reason, and plaintiff's per se claim fails.[9]

2. Plaintiff Cannot as a Matter of Law Prove a Rule of Reason Violation Because There is No Anticompetitive Effect in the Relevant Market

To prove a Rule of Reason violation, Pappas "must demonstrate three elements: (1) an agreement, conspiracy or combination among two or more persons or distinct business entities; (2) which is intended to harm or unreasonably restrain competition; and (3) which actually causes injury to competition beyond the impact on the claimant, within a field of commerce in which the claimant is engaged." Austin v. McNamara, 979 F.2d 728, 738-39 (9th Cir. 1992). The third element requires plaintiff to prove that "the challenged

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[9] Plaintiff will undoubtedly rely on NCAA v. Board of Regents, 468 U.S. 85 (1984) and Regents of University of California v. ABC, Inc., 747 F.2d 511 (9th Cir. 1984), to support its per se argument. See Amended Complaint ¶¶ 31-39. Neither case supports that position. First, even though the television agreements at issue in Board of Regents gave the NCAA "'almost total control over the supply of college football which is made available to the networks, to television advertisers, and ultimately to the viewing public,'" (468 U.S. at 96 (quoting the district court)), the Court held that "it would be inappropriate to apply a per se rule" to that case. Id. at 100. Regents of UC merely reviewed for abuse of discretion the district court's grant of a preliminary injunction, and thus never reached the merits of the challenged CFA television contracts. Moreover, the Court expressly failed to reach the issue of whether a per se or Rule of Reason analysis should apply. 747 F.2d at 516. Finally, the analysis in these cases do not apply here because the NCAA was an absolute monopolist, while the CFA is over three times as big as the Pac-10 and Big Ten combined. Neither of the cases Pappas relies on provides any precedential, nor any persuasive, support for its position. See also Ass'n of Independent TV, 637 F. Supp. at 1295-97 (applying Rule of Reason analysis to the CFA television agreements). Ordover Decl. ¶¶ 9-11.

action has had an actual adverse effect on competition as a whole in the relevant market." Capital Imaging, 1993 WL 196067, *6 (2d Cir. (N.Y.)). "Insisting on proof of harm to the whole market fulfills the broad purpose of the antitrust law that was enacted to ensure competition in general, not narrowly focused to protect individual competitors." Id. at *5; MMM Sales, 849 F.2d at 1172 ("The conduct must have an adverse impact on the competitive conditions in general as they exist within the field of commerce in which the plaintiff is engaged."); see also McGlinchy v. Shell Chemical Co., 845 F.2d 802, 812-13 (9th Cir. 1988) ("'It is the impact on competitive conditions in a definable market which distinguishes the antitrust violation from the ordinary business tort.'") (citation omitted).

Pappas cannot meet its burden under the above tests, because it alleges merely that it was unable to televise live two games on two Saturdays in the Fresno area. Complaint ¶¶ 64-71. Plaintiff's inability to prove harm to overall competition is fatal to its Rule of Reason claim. Austin, 979 F.2d at 738-39.

a. Injury to Pappas Does Not Support an Antitrust Claim

It is black letter law that antitrust protects competition, not competitors. Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 353 (1990); Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 540 (9th Cir. 1991), cert. denied, 112 S. Ct. 1603 (1992). Thus, Pappas' inability to televise the two games in question is irrelevant

to injury to competition, which must go "beyond the impact on the claimant."[10] Austin, 979 F.2d at 739 (emphasis in original) (citation omitted). "Even 'the elimination of a single competitor, standing alone, does not prove anticompetitive effect.'" Id. (quoting Kaplan v. Burroughs Corp., 611 F.2d 286, 291 (9th Cir. 1979), cert. denied, 447 U.S. 924 (1980)) (emphasis in Austin); Bhan, 929 F.2d at 1413 ("The only actual effect shown is that one nurse anesthetist no longer works at one hospital. This alone is not enough to demonstrate actual detrimental effects on competition."); Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 734 (9th Cir. 1987) ("While appellant clearly pleads injury to itself, its conclusion that competition has been harmed thereby does not follow.").

The Supreme Court has twice this year re-affirmed that injury to the market, not a participant in it, is necessary to show competitive injury. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 1993 WL 211562, *10 (U.S.S.C.) ("That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured . . . ."); Spectrum Sports, Inc. v. McQuillan, 113 S. Ct. 884, 891-92 (1993) ("The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market.")

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[10] Similarly, Pappas' allegation that broadcasters like itself are prevented from competing for advertising dollars "which reduces the revenues and profits to such broadcasters" (Amended Complaint ¶ 14(c)), is also irrelevant.

(emphasis added). Where plaintiff cannot show market failure, i.e., an adverse effect on price, quality or output in a realistically defined relevant market, summary judgment is appropriate.[11] Capital Imaging, 1993 WL 196067, *12. Plaintiff does not claim, and cannot prove, such an adverse effect here.

b. 56 Hours of Live College Football Proves a Competitive Market

Even assuming Pappas' alleged geographic submarket of KMPH's ADI, any claim that competition for televised college football in that market has been injured is demonstrably

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[11] Pappas' only attempt to show market failure is to define the market based on his alleged injury -- the inability to televise two games between FSU and Pac-10 schools in the Fresno area. Thus, Pappas' alleged markets: "cross-over" games, those between a Pac-10 member and a non-member (product) and KMPH's Area of Dominant Influence ("ADI") (geographic). The only support for Pappas' illogical market definition is the bare allegation that those are the markets in which "competition" was injured. See Pltf's Interrog. Responses at 13-15 (Declaration of Frank M. Hinman ("Hinman Decl.") Ex. B). The Court should ignore such unsupported assertions. Morgan, Strand, 924 F.2d at 1490 ("[Plaintiffs] conclusorily state that the relevant geographic market is Tuscon. We give little weight to such a conclusory assertion."). In reality, those are the alleged markets because that is where Pappas says it was injured. Such market definition is improper as a matter of law. See Austin, 979 F.2d at 738-39; Oksanen, 945 F.2d at 709 ("Although Page Memorial may be where Oksanen prefers to practice, this preference alone does not justify excluding other hospitals and other doctors from the relevant market definition."). Pappas' absurdly narrow market definition is an implicit admission that it cannot hope to prove anticompetitive effect in a legally supportable market.

false.[12] On the two Saturdays in question, Fresno fans had 56 hours of live college football to choose from.[13] Hinman Decl. Ex. A. There were two, three or even four live games shown at almost all times on both of those days. Id. Sixteen live games, including matchups with enormous fan interest between traditional powerhouses -- Notre Dame vs. Michigan and Penn. State vs. USC -- competed for advertising dollars and viewers on those two days. Id.

The huge variety of top quality college football games available to Fresno viewers disposes of any claim that output or quality has been adversely affected by the Pac-10's agreements. See Ordover Decl. ¶ 21. Pappas' argument also flies in the face of recent history. Under the old NCAA

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[12] At a minimum, the relevant product market is televised major college football. See Board of Regents v. Nat'l Collegiate Athletic Ass'n, 546 F. Supp. 1276, 1297-1300 (W.D. Okla. 1982), aff'd in relevant part, 707 F.2d 1147 (10th Cir. 1983), aff'd 468 U.S. 85 (1984). The Pac-10 will assume for purposes of this motion that other sporting events, as well as other televised entertainment, do not compete with college football. But in any event, Pappas has offered no support, and there is none, for the proposition that "cross-over" games constitute a relevant product submarket. So-called "cross-over" games include a wide variety of matchups, some of high quality and fan interest, others less so. But there is nothing economically unique about those games, and Pappas cannot show that an advertiser or viewer would not substitute any number of other contests for a "cross-over" game.

Indeed, under Pappas' theory of market definition, it has violated the Sherman Act because its contract with FSU gives it exclusive rights to FSU sporting events in KMPH's ADI. Hinman Decl. Ex. D (last page).

[13] Four more games, totalling fourteen more hours, were shown on a delayed basis on those days. Hinman Decl. Ex. A. These games are also part of the product market, although for purposes of this motion the Pac-10 will assume they are not. In any event, it further puts to rest the notion that Fresno fans were starved for college football.

agreements with the networks, which after 1983 the Pac-10/Big Ten and other agreements replaced, only nine hours of live college football were televised per week in any given area. Board of Regents, 546 F. Supp. at 1296; see also Hansen Decl. ¶ 4. Fresno viewers during the weeks in question could choose from an average of eight live games, or 28 hours of football each week. Moreover, from 1987-88 to the past season, the number of national or regional football games on broadcast television increased from 37 to 67, while the number of games cablecast increased from 54 to 192. Hinman Decl. Ex. C.

Likewise, the availability to advertisers of so many top-quality alternatives destroys Pappas' argument that the Pac-10's contracts result in an increased price for advertising that is passed on to consumers. See Complaint at ¶ 14(a). Any attempt by ABC or PTN to change supracompetitive prices for advertising on Pac-10 home telecasts would simply cause advertisers to switch to other games. See Graphic Products Distribution v. Itek Corp., 717 F.2d 1560, 1569 n.11 (11th Cir. 1983); Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 745 (7th Cir. 1982) (Posner, J.) (citing Cowley v. Braden Industries, Inc., 613 F.2d 751, 755 (9th Cir.), cert. denied, 446 U.S. 965 (1980)) (where firm without market power attempts to charge supracompetitive prices, "market retribution will be swift").

c. Competition Was Not Injured Because Pappas Could Not Show One More Football Game

Pappas' argument that competition was injured because it was unable to televise one more college football game on each

of two Saturdays also makes no sense. Apparently, plaintiff's position is that eight games, or 28 hours of college football per day (on average) demonstrates market failure, but nine games, or 31-1/2 hours would characterize a healthy market. That is, to say the least, an unprincipled distinction.

If Pappas' theory of "one more game" were accepted, the courts would be flooded with antitrust lawsuits from every local broadcaster that wanted to show one of its home team's games but could not because of exclusivity provisions in that team's conference's (or the CFA's) television contracts.[14] However, the antitrust laws do not assure that every individual broadcaster gets to show every game, irrespective of healthy competition in the market.[15] See Austin, 979 F.2d at 739; Bhan, 929 F.2d at 1414; Morgan, Strand, 924 F.2d at 1489; McGlinchy, 845 F.2d at 812-13; Rutman, 829 F.2d at 235 ("'The antitrust laws are not designed to guarantee every competitor tenure in the marketplace.'") (citation omitted).

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[14] Pappas' claim is even more tenuous than these hypothetical lawsuits, because, as discussed above at pp. 6-9, a miscommunication, and not the Pac-10's contracts, was the reason Pappas could not show the games it wanted to. As shown at p. 25 below, with proper notice and minor changes in the start times, the games could have been shown live.

[15] The FTC also recognized that the effect on individual broadcasters of the Pac-10 contracts' exclusivity provisions did not merit antitrust scrutiny. It dropped its investigation of the Pac-10/Big Ten, realizing that their television contracts do not have the requisite anticompetitive effect. Ordover Decl. ¶¶ 15 & 23. Similarly, in BMI, the Justice Department had entered into a consent decree with defendants regarding their challenged practice. The Court noted that "the Federal Executive and Judiciary have carefully scrutinized . . . the challenged conduct" and that "the Court of Appeals should not have ignored [that fact] completely in analyzing the practice." 441. U.S. at 18.

Pappas will likely argue that the fact that fans interested in watching, live, the FSU games against WSU and OSU were unable to proves injury to competition. This "disappointed viewer" argument is merely the flipside of Pappas' assertion that competition was injured because Pappas could not televise one more game, and is similarly flawed. Antitrust does not judge market failure by focusing narrowly on one group's interest; it evaluates competition in the market as a whole. E.g., Austin, 979 F.2d at 738-39. There will always be groups of viewers, perhaps even large groups, who are not able to watch the game they want to watch every week. Absent a lack of overall competition, the failure to satisfy those particular desires is not market failure that the antitrust laws seek to prevent.[16] Id.; see also Oksanen, 945 F.2d at 708 (it would "trivialize" the antitrust laws to evaluate an alleged restraint not "based on its impact on competition as a whole within the relevant market," but by an alleged injury to a specific group); Ordover Decl.

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[16] Moreover, the effect on the "disappointed viewer" is minimal in any event. First, the Pac-10's contracts have no effect on that viewer's ability to watch FSU games on a delayed basis. Hansen Decl. ¶ 11. It is quite common for teams with a strong local following to tape delay their telecasts. Livengood Decl. ¶ 2; Baughman Decl. ¶ 2; Hansen Decl. ¶ 8. Second, the Pac-10's contracts have no effect on the telecast of its member schools' away games. Hansen Decl. ¶ 7. For example, when FSU hosted WSU and OSU during the 1992 and 1993 seasons, respectively (Johnson Decl. ¶ 3), KMPH was free to televise the games live any time it wanted. Third, the Pac-10 agreements are written to allow overlap between the ABC and PTN telecasts and those of other broadcasters. Id. As shown below, an approximately one hour change in the kickoff times would have allowed both the WSU and OSU games to be shown live in Fresno. Fourth, FSU only played two away games against Pac-10 opponents during the 1991 season. Johnson Decl. ¶ 3. Thus, at most, the Pac-10 contracts affected only two of FSU's entire season of games available for live telecasting.

¶¶ 24-31. Thus, Pappas cannot bootstrap any alleged effect on FSU fans into overall competitive injury either.

As a matter of law and logic, the antitrust laws do not condemn an agreement that, at most, interferes with the ability of a particular broadcaster to televise, or a certain viewer to watch, an occasional live football game.

d. The Pac-10 Agreements Did Not Cause Pappas' Alleged Injury

Not only did the Pac-10's agreements not injure competition as a matter of law, they did not even cause Pappas' alleged injury. KMPH was unable to televise the games in question live because of miscommunication and the failure to make the necessary arrangements, not because of the Pac-10 contracts, which are designed to provide enough room for games like these to be shown. Hansen Decl. ¶ 4. Had WSU and OSU understood that FSU sought live telecasts, the kickoff times of those games might simply have been moved about an hour each to avoid the exclusivity periods of ABC and PTN. See footnote 3, above. Indeed, Pappas admits as much. Complaint ¶ 67. However, by the time OSU and WSU became aware that KMPH planned a live telecast, it was too late, as tickets had been sold, and there wasn't enough time to notify fans of a change. Livengood Decl. ¶ 4; Baughman Decl. ¶ 3.

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The remainder of Pappas' Sherman Act claims must fall along with its section 1 claim, because claims under section 2 also require a plaintiff to prove competitive injury. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 31 (1984)

("Without a showing of actual adverse effect on competition, [a plaintiff] cannot make out a case under the antitrust laws . . . ."); McGlinchy, 845 F.2d at 811 ("injury to competition . . . is required under both sections 1 and 2 of the Sherman Act"). Thus, in the following sections we discuss in detail only the independent grounds for dismissing those claims.

3. Pappas Cannot Prove Its Monopolization Claim

To prove monopolization, Pappas must show (1) monopoly power; (2) the willful acquisition or maintenance of that power; and (3) causal antitrust injury. MMM Sales, 849 F.2d at 1169. It cannot. First, Pappas cannot prove that the Pac-10 holds monopoly power in any of the markets it alleges. All of Pappas' alleged product markets and submarkets are for televised college football. Pappas cannot claim that the Pac-10 competes in, let alone dominates, that market. The Pac-10 members play football games, they don't televise them. Nor can Pappas prove the second element of this claim, because "[t]he test of willful maintenance or acquisition of monopoly power is whether the acts complained of unreasonably restricted competition." MMM Sales, 849 F.2d at 1174. Where plaintiff fails to show competitive injury in a section 1 claim, a section 2 claim based on the same facts fails as well. Id. This claim is both legally and factually deficient as a matter of law.

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4. Pappas Cannot Prove Attempted Monopolization

To prove attempt to monopolize, Pappas must establish four elements: (1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed toward accomplishing that purpose; (3) a dangerous probability of success; and (4) causal antitrust injury. McGlinchy, 845 F.2d at 811. Attempted monopolization requires a plaintiff to prove that the defendant possesses some economic power in the relevant market. Spectrum Sports, 113 S. Ct. at 891. Just as Pappas cannot prove the Pac-10 has monopolized a market (television) in which it does not compete, it cannot show an attempt to monopolize that market. See section 3, above. Also, the failure to prove competitive injury disposes of this claim as well. See Austin, 979 F.2d at 739 ("Because there was no indication of an injury to competition, there was no cognizable antitrust injury.").

5. Pappas Cannot Prove Section 2 Conspiracy To Monopolize

Pappas' section 2 conspiracy claim must fall along with the section 1 claim, because if Pappas cannot prove a conspiracy to restrain trade, it cannot show a conspiracy to monopolize. Williams v. I.B. Fischer Nevada, 93 Daily Journal D.A.R. 9323, 9324 (9th Cir. 1993) (copy attached as Exhibit A) (citing Thomsen v. Western Elec. Co., 680 F.2d 1263, 1267 (9th Cir.) ("a § 1 claim insufficient to withstand summary judgment cannot be used as the sole basis for a § 2 claim"), cert. denied, 459 U.S. 991 (1982)).

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6. Pappas Cannot Prove Its Cartwright Act Claim

The elements of a Cartwright Act claim are "[t]he formation and operation of a conspiracy; illegal acts done pursuant thereto; a purpose to restrain trade; and the damage caused by such acts." G.H.I.I. v. MTS, Inc., 147 Cal. App. 3d 256, 265 (1983). The Cartwright Act is patterned after the Sherman Act, and cases interpreting the latter are applicable to the former. McGlinchy, 845 F.2d at 811 n.4. "The federal and California antitrust laws, having identical objectives, are harmonious with each other." Pardee v. San Diego Chargers Football Co., 34 Cal. 3d 378, 382 (1983), cert. denied, 46 U.S. 904 (1984). Thus, the Sherman Act cases discussed above also apply to defeat plaintiff's Cartwright Act claim. See McGlinchy, 845 F.2d at 811 n.4 (where federal and state antitrust claims rest on the same facts, "our conclusion [affirming summary judgment] with regard to the Sherman Act claims applies with equal force to appellants' Cartwright Act claims").[17]

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[17] In addition, Cartwright Act cases independently require Pappas to prove anticompetitive effect. The Cartwright Act requires "serious harmful competitive impact." G.H.I.I., 147 Cal. App. 3d at 270; see also Kolling v. Dow Jones & Co., 137 Cal. App. 3d 709, 723 (1982) (Cartwright Act is designed to protect the public "from a restraint of trade or monopolistic practice which has an anticompetitive effect on the market") (emphasis added). Thus, Pappas' Cartwright Act claim falls along with its Sherman Act claims, because it cannot as a matter of law prove anticompetitive effect.

III. CONCLUSION

As the above discussion shows, Pappas can prove no injury caused by the Pac-10, much less one cognizable under the antitrust laws. Its improper antitrust claims, as well as the illusory tort claims from which they arose, should be dismissed.

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Respectfully submitted,

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